

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42961
Docket No. SG-43632
18-3-NRAB-00003-160398**

The Third Division consisted of the regular members and in addition Referee Kathryn A. VanDagens when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
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(CSX Transportation, Inc.

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the CSX Transportation (formerly Louisville & Nashville):

Claim on behalf of K. L. Brooks, for compensation for all lost time, the overhead suspension and any other mention of this matter removed from his personal record, account Carrier violated the current Signalmen’s Agreement, particularly Rule 55, when it issued the Claimant the harsh and excessive discipline of a 25 day actual suspension and a five (5) day overhead suspension without providing him a fair and impartial Investigation, and without meeting its burden of proving the charges in connection with an Investigation held on January 7, 2015. Carrier’s File No. 285603. General Chairman’s File No. 14-208-14D. BRS File Case No. 15437 -L&N.”

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The Claimant entered Carrier's service on September 4, 1990. At the time of the discipline, the Claimant was assigned to the position of Independent Signal Foreman in the Carrier's Signal Department.

"The Claimant received a Notice of Investigation dated December 22, 2014:

The purpose of this formal Investigation is to determine the facts and place your responsibility, if any, in connection with information received December 22, 2014, that you claimed ten (10) hours of overtime on Monday, December 15, 2014, while you were on vacation during the week ending December 19, 2014.

In connection with the above incident, you are charged with failure to properly and safely perform the responsibilities of your position, dishonesty, falsification of payroll, and possible violations of, but not limited to, CSXT Operating Rules 100.1, 104.1, 104.2, and 104.3."

After an Investigation, the Carrier determined that the Claimant violated CSX Transportation Operating Rule 100.1, and on January 19, 2015, assessed discipline in the form of a 25 day actual suspension and a 5 day overhead suspension.

"Operating Rule 100.1 states:

Employees must know and comply with the rules, instructions, and procedures that govern their duties. They must also comply with the instructions of supervisors. When there is uncertainty, employees must: (1) take the safest course of action, and (2) contact a supervisor for clarification."

There is no dispute that the Claimant was scheduled for vacation on December 15, 2014, but claimed ten hours of overtime work for that day. GPS records showed no movement for the Claimant's vehicle for seven hours on that day. The Claimant testified that he received multiple phone calls from foremen and others during his vacation day, some of which caused him performing other tasks. He said that his previous supervisor told him to take calls during his vacation and that he would be paid. The Claimant admitted that his current supervisor has never instructed him that he needed to answer his company phone while on vacation. Charging Officer Sal Diiorio said that he was surprised and concerned to see the Claimant claim work time in addition to vacation time for December 15, 2014.

The Carrier contends that no one instructed the Claimant to work on December 15, 2014, and that employees must obtain authorization from management before working overtime hours while on vacation. The Carrier contends that by claiming overtime pay without permission for work that no one told him to accomplish, the Claimant is in violation of CSXT Operating Rule 100.1. The Carrier contends that the Claimant's testimony that he worked for ten overtime hours is self-serving, and that credibility resolutions are best left to the hearing officer. The Carrier contends that even if the Claimant had an understanding with his prior supervisor, it was the Claimant's responsibility to clarify overtime procedures with his new supervisor. The Carrier contends that a thirty-day suspension was warranted and within the parameters of the Carrier's IDPAP, which provides that a second infraction of a Serious Offense in three years results in a 30 day suspension.

The Organization contends that the Carrier has failed to provide substantial evidence to prove the charges against the Claimant. The Organization contends that the Claimant was performing his duties as an Independent Foreman on December 15, 2014, with permission, as he has done numerous times for three years. The Organization contends that the Claimant has produced documents that prove that he was conducting Carrier business from his home on December 15, 2014, as allowed by his prior supervisor. The Organization contends that the Claimant does not need to move his vehicle to perform his duties, as his tools are his cell phone and laptop computer. The Organization contends that all of the Claimant's submitted payroll was approved by his previous and current managers. The Organization contends that Diiorio's testimony was not reliable, as he was not the Claimant's supervisor, and was unaware of the nature of the Claimant's duties. The Organization contends that the penalty imposed was harsh and excessive, in light of the Claimant's 25 years in the Carrier's service with no prior discipline. The Organization contends that the Claimant has admitted his mistake, and that there was no intent to deceive or defraud the Carrier by working during his vacation to save the Carrier money.

The Board finds that the Carrier has shown that the Claimant claimed overtime pay for hours worked while on vacation, without prior permission from his current supervisor. The record demonstrates that the Claimant did perform actual work for the Carrier during the claimed hours. Nonetheless, the Carrier has met its burden of proving a violation of CSXT Operating 100.1, as the Claimant should have clarified the procedure with his new supervisor before claiming overtime pay for overtime hours while on vacation. However, in light of the Claimant's prior three-year practice of responding to calls while on vacation and his previous supervisor's instruction to do so, the Carrier has not proved that the Claimant had an intent to deceive or defraud the Carrier.

While discipline for this rule violation might ordinarily be appropriate, this discipline was given to the Claimant at the same time as another suspension for failing to obtain his current supervisor's authorization to continue a practice approved by his previous supervisor. Furthermore, the level of discipline meted was based on the fact that this was the Claimant's second infraction in three years. There is a line of arbitral precedent recognizing that a reasonable time interval between each escalating step is essential for a bona fide progressive discipline system to allow the employee an opportunity to learn from the previous step and adjust his behavior. Second Division Award 13686. Discipline that deprives an employee of a meaningful opportunity to learn from previous warnings cannot stand. The Claimant could not correct behavior that had already occurred when the companion suspension was imposed. While he may have benefitted from an opportunity to correct his behavior, he was not given an opportunity because the two suspensions were handed down at the same time. For this reason, the Board finds that the claim must be sustained.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 14th day of February 2018.